

- *Acknowledges that it applies to new categorical exclusions that agencies establish under their regulatory authority, and not to those categorical exclusions established by statute. The final document should specifically state that the guidance does not apply to the categorical exclusions established by Section 390 of the Energy Policy Act of 2005.* The statement in the February 18, 2010 memorandum that it is limited to categorical exclusions established by federal agencies pursuant to 40 C.F.R. §1507.3 helps clarify the intended scope.
- *Encourages agencies to continue to establish categorical exclusions for those categories of actions which do not individually or cumulatively have a significant effect on the human environment.* We are encouraged by CEQ's statement in Section II. A. of the February 18, 2010 memorandum that agencies "should" establish and use CEs for actions that, absent extraordinary circumstances, do not have significant environmental effects. This statement is consistent with recommendations in Chapter 5 of "The NEPA Task Force Report to the Council on Environmental Quality – Modernizing NEPA Implementation," (Sep. 2003).
- *Explains that agencies should seek to describe the activity which is considered for a categorical exclusion in as precise terms as possible.* API believes that the description of a categorical exclusion provided in Section II.C.1. of the February 18, 2010 memorandum will be of key importance to agencies.
- *Simplifies documentation requirements. The guidance should direct agencies to base categorical exclusions on existing data, rather than suggest that agencies must engage in a lengthy information collection process.* API is encouraged by the discussion in Section III.A. of the February 18, 2010 memorandum that describes alternatives for agencies to substantiate establishment and/or use of CEs, and recognizes that the amount of information should vary depending on the facts initially presented by the action for which a CE is considered. API expects that the February 18, 2010 memorandum will be used in future direct consultation between CEQ and agencies seeking CEQ's guidance. In that event, AP recommends that CEQ encourage agencies to incorporate information that is useful and necessary to a determination that a CE is appropriate, and to avoid development and use of information merely for background purposes.
- *While encouraging informal consultation with interested members of the public when considering a new class of categorical exclusion, avoids burdening or appearing to burden the agency with cumbersome and potentially inconclusive review and comment and feedback processes, which are unnecessary for activities that do not have an impact on the environment.* API believes that "Procedures for Establishing a New Categorical Exclusion" in Section IV of the February 18, 2010 memorandum are reasonable as described. We caution that the process described in this section should be managed to avoid the accretion of complex and time-consuming paperwork that has afflicted a significant number of other NEPA processes.
- *Avoids burdening the agency with redundant or unnecessary time- and resource-consuming decision and documentation processes in connection with the use or application of a categorical exclusion to a particular activity.* We believe this issue is adequately addressed in the February 18, 2010 memorandum.
- *Avoids confusing end-user agencies.* CEQ should consider striking a balance between the clarity and economy found in existing CEQ regulations at 40 C.F.R. Sections 1507.3 and 1508.4, and the benefits of providing more detailed explanation as found in the February 18, 2010 memorandum, to



avoid the unintended result of discouraging -- rather than encouraging -- use of CEs. We believe that CEQ has quite the opposite intent in developing this guidance, which is why we would encourage re-examination of Section 1502 of CEQ's regulations to determine whether amendments are needed to align the regulations with the guidance provided in the February 18, 2010 memorandum.

API notes that the February 18, 2010 memorandum has added a description of what is meant by the term "Extraordinary Circumstances" (Section II.C. 2.). We recommend a modification to one of the sentences in that section for the purpose of clarity:

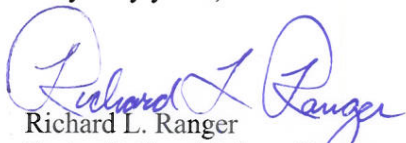
For example, the presence and nature of a protected resource (e.g., threatened or endangered species or historic resource), *and a determination that a proposed action will have non-negligible or non-beneficial impacts on that resource* (italicized language inserted), is an appropriate extraordinary circumstance for situations where the categorical exclusion would not be appropriate for a proposed action taking place where protected resources may be present.

API believes the test for "Extraordinary Circumstances" should depend upon the nature of possible impacts, if any, to the protected resource, not on the mere existence of the protected resource. This should include consideration of possible impacts or potential effects that are expected to remain after application of mitigation measures, if any, to the protected resource.

Overall, API is encouraged by CEQ's recognition that CEs serve a beneficial purpose as described in 40 C.F.R. §1508.4 to allow more expedited review when an activity can reasonably be shown not to have an effect, cumulatively or individually, on the human environment. API commends CEQ for its effort to date.

If you need additional information, please contact Richard Ranger at 202.682.8057.

Very truly yours,



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